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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES, ITS TERRITORIES AND CANADA, AFL-CIO, CLC, LOCAL 838,
Respondent Union,

and

Case 27-CB-093060

CORY B. SWARTZ , the Charging Party,

and

FREEMAN DECORATING COMPANY, an Employer.

RESPONDENT'S MEMORANDUM PURSUANT TO ORDER OF TRANSFER OF THIS PROCEEDING TO THE NATIONAL LABOR RELATIONS BOARD

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I.

STATEMENT OF THE CASE

This matter comes before the Board by its Order of April 30, 2014 approving the parties' Joint Motion To Transfer Proceedings to the National Labor Relations Board and Joint Stipulation of Facts.

II.

JOINT STATEMENT OF FACTS

The parties' Joint Statement of the Facts as set forth in the Join Motion at pages 4-9 are as follows:

General Counsel, the Charging Party, and Respondent stipulate and agree to the following facts in Case 27-CB-093060:

1.

(a) The charge in this proceeding was filed by the Charging Party on November 13, 2012, and a copy was served by regular mail on Respondent on the same date. A copy of the charge is attached and marked as **Exhibit 1**.

(b) The amended charge in this proceeding was filed by the Charging Party on January 23, 2013, and a copy was served by regular mail on Respondent on January 24, 2013. A copy of the amended charge is attached and marked as **Exhibit 2**.

2.

On March 28, 2013, the Regional Director for Region 27 of the Board (Regional Director) issued a letter approving withdrawal of certain allegations contained in the amended charge referred to above in paragraph 1(b). A copy of the withdrawal letter is attached and marked as **Exhibit 3**.

3.

On March 28, 2013, the Regional Director issued a Complaint and Notice of Hearing in Case 27-CB-093060 pursuant to Section 10(b) of the Act, 29 U.S.C. § 151 et

seq., and Section 102.15 of the Board's Rules and Regulations. A copy of the Complaint and Notice of Hearing is attached and marked as **Exhibit 4**.

4.

Respondent's Answer to the Complaint and attached documents was served on all Parties on April 10, 2013. A copy of Respondent's Answer to the Complaint and any attached documents is attached and marked as **Exhibit 5**.

5.

(a) At all material times, Freeman Decorating Company (Employer), has been a corporation headquartered in Dallas, Texas, with branch offices throughout the United States, and has been engaged in the business of producing special events, including trade shows in Salt Lake City, Utah.

(b) During the calendar year ending December 31, 2012, the Employer, in conducting its operations described above in paragraph 2(a), performed services valued in excess of $50,000 in States other than the State of Utah.

(c) At all material times the Employer has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

6.

At all material times, Respondent has been a labor organization within the meaning of Section 2(5) of the Act.

7.

(a) Since at least May 13, 2012, the Employer and Respondent have maintained an agreement requiring that Respondent be the exclusive source of referrals of employees for employment with the Employer, which provides in relevant part:

> The Company grants the Union the exclusive right to refer applicants to be employed by the Company to perform work covered by this Agreement and will communicate all labor needs exclusively to the Union Business Representative and the show site Job Steward.

(b) Since at least May 13, 2012, Respondent has maintained the following attendance rule in its Job Referral Procedure (attached and marked as **Exhibit 6**) *(*italic emphasis added, bold emphasis in original):

> G. Suspension and Removal-from the Referral List
>
> Any referent who fails to report to work on time will automatically be suspended from the referral list *until referent has paid a $25.00 assessment*. Referents will be notified by regular mail of each offense and may request an appeal, in writing, before the Referral Committee within ten days of the date of the notice.
>
> Any referent, who fails to report to work, will be suspended from the Referral procedure *until the Referent has paid a $100.00 assessment.* Any Referent who fails to report to work the second time will automatically be suspended from the Referral list *until the Referent has paid a $150.00 assessment*. Failure to report to work for the third time will cause the Referent to be automatically suspended from the Referral list *until the Referent has paid a $200.00 assessment*. A Referent who fails to report to work for the fourth time will automatically be permanently removed from the referral list. **All frequency of offenses refers to the preceding twelve month period.** Referents will be notified by regular mail of each offense and may request an appeal, in writing, before the Referral Committee within ten days of the date of the notice. *All assessment [sic] must be paid before Referent is eligible for dispatch.*

8.

(a) The Parties stipulated that Utah and Idaho are “right-to-work” states, and are the only locations in which Respondent operates its hiring hall.

(b) The Parties stipulate that membership in Respondent is not a condition of employment or requirement to be eligible for referral for employment under Respondent’s Job Referral Procedure.

(c) The Parties stipulate that the General Counsel does not allege or contend that the assessment of the attendance rule fines is applied disparately against members and non-members of Respondent.

(d) The Parties stipulate the proviso of Section 8(b)(1)(A) guarantees a union the right “to prescribe its own rules with respect to the acquisition and retention of membership therein.”

(e) The Parties stipulate that a union has the authority to reasonably discipline members who violate rules and regulations governing membership in order to maintain solidarity and be an effective representative of its members' economic interests.

(f) The Parties stipulate that maintaining an attendance rule addresses a legitimate concern of Respondent in the effective performance of its representative function as the administrator of the hiring hall.

(g) The Parties stipulate that Respondent contends that the attendance rule and resulting fines maintained in its Job Referral Procedure is necessary to the effective performance of its hiring hall referral function so as to preserve Respondent’s reputation and relationship with employers to which it supplies labor.

(h) The Parties stipulate that the assessment of the attendance fine is only for violations of Respondent's Job Referral Program and not for a violation of any internal membership rule of Respondent's subject to members of Respondent only.

9.

Attached and marked as **Exhibits 7 and 8**, respectively are documents relating to a different IATSE Local Union that were provided by Respondent as part of its defense. Exhibit 7 is the Region 10 Regional Director's dismissal letter in Case 10-CB-9005. Exhibit 8 is IATSE Local 834 Rules and Regulations Governing the Referral of Exhibition Employees, which was at issue in Case 10-CB-9005. General Counsel does not object to inclusion of these two Exhibits as part of the record, but specifically objects to the relevance and materiality of Exhibits 7 and 8.

10.

The Parties agree that to the extent that there are minor variations between the allegations in the Complaint and the facts set forth in this Joint Stipulation, the Complaint is amended to conform to the Joint Stipulation.

11.

This Stipulation of Facts, including the attached Exhibits, contains the entire agreement between the Parties, there being no other agreement of any kind, oral or otherwise, expressed or implied, which varies, alters or adds to the Stipulation of Facts.

III.

QUESTIONS INVOLVED AND TO BE ARGUED BEFORE THE BOARD

As set forth in the Joint Motion, the legal issues to be resolved in this proceeding, as stated by the parties, are as follows.

A.

GENERAL COUNSEL'S STATEMENT OF ISSUES

General Counsel asserts that the legal issues to be resolved in this matter are:

1. Whether Respondent violated Section 8(b)(1)(A) of the Act by maintaining an attendance rule in its Job Referral Procedure that conditions eligibility for dispatch/job referral upon the payment of fines to Respondent; and

2. Whether Respondent's attendance rule is facially unlawful in violation of Section 8(b)(1)(A) of the Act because it restrains and coerces employees in the exercise of the rights guaranteed in Section 7 of the Act.

In further addressing the issues before the Board, Counsel for the General Counsel's Statement of Position, Exhibit 9 attached to the Joint Motion, states:

> "Preliminarily, General Counsel notes that the facts of the instant case are not in dispute. Respondent admits to maintaining the attendance rule at issue during all relevant times.[1] While General Counsel acknowledges that Respondent has a legitimate interest in ensuring that referred employees show up for work on time, General Counsel alleges that maintenance of this attendance rule, which, as currently constructed, conditions future job referrals on payment of assessments to the Union, violates Section 8(b)(1)(A) of the Act because it interferes with employees' Section 7 rights. *Thus, this case solely presents an issue of law regarding whether Respondent's attendance rule is facially unlawful.*" (Italics added.)" (footnote included).

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[1] Respondent's entire Job Referral Procedure is attached to the Joint Stipulation as Exhibit 6. Section G. Suspension and Removal-from the Referral List, contains the rule alleged to be facially unlawful:

> "Any referent who fails to report to work on time will automatically be suspended from the referral list until referent has paid a $25.00 assessment. . . .
>
> Any referent, who fails to report to work, will be suspended from the Referral procedure until the Referent has paid a $100.00 assessment. Any Referent who fails to report to work the second time will automatically be suspended from the Referral list until the Referent has paid a $150.00 assessment. Failure to report to work for the third time will cause the Referent to be automatically suspended from the Referral list until the Referent has paid a $200.00 assessment. A Referent who fails to report to work for the fourth time will automatically be permanently removed from the referral list."

B.

RESPONDENT'S STATEMENT OF ISSUES

Respondent asserts that the legal issues to be resolved in this matter are:

1. Is the attendance rule and fine facially unlawful or per se illegal and if not, does the Complaint fail to state a claim upon which relief can be granted;
2. Is the maintenance of the attendance rule and fine entitled to any presumption of illegality under 8b(1)(A) of the Act, and if so, should the Complaint be dismissed or should the matter be set for hearing to allow Respondent to rebut such presumption under tests to be determined by the Board in this matter, such as a showing that the Union did not have an illegal motive or improper purpose in assessing the fines or that the attendance rule is maintained for valid reasons or is otherwise not unlawful and outweighs employees Section 7 rights; and,
3. Whether the attendance rule and fines are lawful because they do not restrain or coerce employees in the exercise of their Section 7 rights in the absence of a union security clause, when the fines are applied equally to members or non-members of Respondent in the legitimate operation of an exclusive hiring hall and under the stipulated facts and allegations in this matter which are not in genuine dispute.

IV.

SUMMARY OF ARGUMENT

Respondent did not violate Section 8(b)(1)(A) of the Act by maintaining an attendance rule in its Job Referral Procedure that conditions eligibility for a referral upon the payment of an assessment for not showing up to work. Section 8(b)(1)(A) of the Act was not intended to prohibit this type of Union conduct. It does not wrongfully intimidate or coerce employees in the exercise of their Section 7 rights. Rather is regulates the proper operations of Respondent's hiring hall for legitimate purposes. Unions in operating their hiring hall have long been able to make assessments, such as service

fees, and to collect payments other than regular union dues, as a condition of employment. The assessment in issue is no different, for a legitimate purpose and lawful.

The cases the General Counsel relies on to contend the attendance rule is facially unlawful under the Act, do not support this claim and are distinguishable. They apply to union organizational rules effecting only union members and whether they interfere with their employment. The hiring hall rule at issue admittedly impacts employment but applies equally to members and non-member of the union alike. Section 7 and Section 8(a)(3) of the Act should not be construed to disallow the attendance rule simply because these provisions permit union dues as a condition of membership to interfere with employment since paying the assessment is not a condition of union membership. It is a properly tailored rule necessary to achieve the Union's legitimate purposes. Furthermore, the Union is entitled to justify the attendance rule. Therefore the rule cannot be declared and is not facially invalid.

Violations of other provisions of Section 8(b) do not give rise to derivative violations of Section 8(b)(1)(A) of the Act, and have not been alleged.

Accordingly, the Complaint should be dismissed for failure to state a claim. If the Board does not dismiss it, the matter should be remanded for hearing to allow Respondent to rebut any presumption of illegality in maintaining the attendance rule, or otherwise justify the rule as directed by the Board consistent with law.

ARGUMENT

V.

THE PRINCIPAL CASES RELIED ON BY THE GENERAL COUNSEL DO NOT SUPPORT THE CONTENTION THE ATTENDANCE RULE IS FACIALLY UNLAWFUL AND ARE DISTINQUISHABLE BECAUSE THEY APPLY TO UNION MEMBERSHIP STATUS.

The principal cases relied on by the General Counsel in its position statement and as cited in those cases, do not support the contention the attendance rule in the hiring hall is facially invalid. They are distinguishable. These cases shall be reviewed and are as follows:

1. Intl. Longshoremen's & Warehousemen's Union, Local. 13 (Pacific Maritime Association), 228 NLRB 1383, 1385 (1977), *enforced,* 581 F.2d. 1321 (9th Cir. 1978), *cert. denied,* 440 U.S. 935 (1979), (referred to herein as *ILWU Local 13)*.

2. *International Union of Operating Engineers, Local 18, AFL-CIO (William Murphy/Ohio Contractors Ass'n)* 204 NLRB 681 (1973), *remanded*, 496 F.2d 1308 (6th Cir.1974), *reaff'd* 220 NLRB 147 (1975), *enforcement denied* 555 F.2d 552 (6th Cir. 1977) (referred to herein and in several case as *Ohio Contractors Ass'n)*.

3, *Radio Officers' Union of the Commercial Telegraphers Union, AFL (A.H. Bull S.S. Co.) v. NLRB* 347 U.S. (1954), (referred to herein as *Radio Officers' Union)*.

4, *Scofield v NLRB* 394 U.S. 423, 430 (1969)(referred to herein as *Scofield).*

5. *N.L.R.B. Allis-Chalmers Manufacturing Company*, 388 U.S. 175 (1967).

6. Fisher Theatre, 240 NLRB 678, 691 (1979).

1. *International Longshoremen's & Warehousemen's Union, Local 13 (Pacific Maritime Association)*:

The General Counsel principally relied on *Intl. Longshoremen's & Warehousemen's Union, Local. 13 (Pacific Maritime Association),* 228 NLRB 1383, 1385 (1977), *enforced,* 581 F.2d. 1321 (9th Cir. 1978), *cert. denied,* 440 U.S. 935

(1979), (*ILWU Local 13* herein) to support its Complaint, setting forth in its position statement at Exhibit 9 of the Stipulated Joint Statement of Facts, its position as follows:

> "In general, when a union operating an exclusive hiring hall prevents an employee from being hired or causes an employee's discharge, the effect of the union's action is to unlawfully encourage union membership because the union has displayed to all users of the hiring hall its power over their livelihoods. *Stage Employees IATSE Local 720 (AVW Audio Visual)*, 332 NLRB 1, 2 (2000), *revd. on other grounds,* 333 F.3d 927 (9th Cir. 2003. While that presumption may be rebutted where the union's action was pursuant to a lawful union security clause or was necessary to the effective performance of its representative function, the Board has consistently held that a union may not refuse to refer an employee for employment to enforce the collection of a fine and/or assessment. *ILWU, Local 13*, supra at 1385 (union violated Section 8(b)(1)(A) by refusing to dispatch member for failing to pay fines and assessments); *Fisher Theater,* 240 NLRB 678, 691-92 (1979) (union unlawfully refused to refer members for failure to pay union fines imposed for violation of union's no-bumping policy)."

The General Counsel's basic contention as above and in its Issue No 2 inquiring if "Respondent's attendance rule is facially unlawful in violation of Section 8(b)(1)(A)", is that the union assessment is not for periodic dues and is plainly illegal because its non-payment interferes with work and the Board has consistently prohibited this.

In *ILWU Local 13,* the Union's illegal conduct was concededly based upon "its internal rule whereby members' dues would not be accepted until all fines and assessments were paid….." and until such time as the assessments were paid, employees were notified they would not be allowed to work. *id.* at 1385.

It is unclear from the Board's decision what Union internal rule was violated that lead to the Union not accepting the charging party's tender of dues on January 15, 1976. Nevertheless, the Union did dispatch the member on January 18. At the work site the Union Business Representative inquired if he had paid his fines. Advised he had

not the Business Representative asked the charging party to call for his replacement. On January 19, the charging party paid his delinquent fines and dues. However, the Business Representative filed an internal complaint against him for working on January 18 having not paid his fines. This charge resulted in the Union barring the charging party from using the hiring hall. See *ILWU Local 13 supra* at 1384-1385 for these facts. The Union was found to have violated both 8(b)(1)(A) and 8(b)(2) of the Act.

It is apparent *ILWU Local 13* does not address the issue in this case as the rules there regarding payment of fines before accepting payment of dues applied only to members. There the charging party paid the dues covering the hiring hall service fee applying to non-members. Membership in the union was not a condition of employment under the contract. *id.* at 1184.

The attendance rule at issue in this case is far different. It applies to both members and non-members equally, and is a part of the hiring hall procedures, wholly unrelated to assessments against union members. It has nothing to do with union dues or other assessments of a member.

Both parties stipulated the assessment of the attendance fine is only for violations of Respondent's Job Referral Program and not for a violation of any internal membership rule of Respondent's subject to members of Respondent only. Stipulation of Facts 8(h).

The parties "stipulated that maintaining an attendance rule addresses a legitimate concern of Respondent in the effective performance of its representative function as the administrator of the hiring hall." See Stipulation of Facts 8(f).

The parties stipulated "that the General Counsel does not allege or contend that the assessment of the attendance rule fines is applied disparately against members and non-members of Respondent." Stipulation of Fact No. 8(c).

The assessment for not showing up to work may be appealed by a referent, regardless of membership, under the Job Referral Procedure at Section G. ("JRP" herein.) See Exhibit 6 to the Joint Statement of Facts.

The "attendance rule" stipulated to, is defined at Statement of Fact 7(b) to be suspension from referral until payment of the assessment for failing to report, as set forth therein in Section G of the JRP.

Moreover, the Regional Director approved the withdrawal of the Amended Charges at Exhibit 2, going to "Section 8(b)(1)(A) and (2) of the Act that the Charged Party unlawfully: (1) operated its hiring hall in a manner that was arbitrary, discriminatory or in bad faith; (2) fined, suspended, and failed to refer an employee; and (3) unlawfully failed to follow its job referral procedures regarding discipline and appeals." Stipulation of Fact No. 2 and Exhibit 3.

Clearly, a violation of the attendance rule does not affect membership status and thereby jeopardize employment. *ILWU Local 13,* espoused sound principals under law about insulating employee's jobs from their organizational rights. However, these organizational rights plainly have no bearing in the current dispute.

In *ILWU Local 13,* the refusal to refer the member to work was unlawful as it was not pursuant to a valid union security clause under 8(b)(2). However, the necessity defense was not applicable in that case, as the ALJ stated at footnote 3:

> "A labor organization may also take action which interferes with employment in instances where the facts show that the union action was necessary to the

> effective performance of its constituency' *International Union of Operating Engineers, Local 18, AFL-CIO (William Murphy)* 204 NLRB 681 (1973). However, this defense would not be applicable to the situation presented by the instant case and it has not been raised by Respondent."[2]

In this case the necessity defense has been asserted and is applicable. See Respondent's Answer at Fourth Defense at Exhibit 5 to the Stipulation.

2. International Union of Operating Engineers, Local 18, AFL-CIO (William Murphy/Ohio Contractors Ass'n).

O*hio Contractors Ass'n* strongly supports Respondent's position that the Complaint should be dismissed for failure to state a claim. There, a union member, Murphy, was charged with disrupting a union election which resulted in him being fined, suspended from membership and taken out of priority for job referrals. The ALJ found this violated 8(b)(2) of the Act, invoking a *per se* rule of illegality "whenever a union interferes with an employee's employment status for reasons other than the failure to pay dues and initiation fees, of *other forms of service fees uniformly required for the use of a hiring hall*…" 204 NLRB at 681. (italics added). The Board stated:

> "We agree with the Administrative Law Judge's ultimate conclusion that Respondent violated Section 8(b)(1) and 8(b)(2) of the Act. However, we do so for somewhat different reasons. The Administrative Law Judge's decision rests on the rationale that a violation of Section 8(b)(2) occurs whenever a union interferes with an employee's employment status for reasons other than the failure to pay dues and initiation fees or other forms of service fees uniformly required for the use of a hiring hall. This *per se* approach derives from a misconception of the law and is clearly at odds with Board precedent.f2
>
> "When a union prevents an employee from being hired or causes an employee's discharge, it has demonstrated its influence over the employee and its power to affect his livelihood in so dramatic a way that we will infer - or, if you please, adopt a presumption that the effect of its action is to encourage union

[2] *Operating Engineers Local 18* is otherwise known as *Ohio Contractors Ass'n*., as it is referred to in *Fisher, supra.*

> membership on the part of all employees who have perceived that exercise of power.f3 But the inference may be overcome, or the presumption rebutted, not only when the interference with employment was pursuant to a valid union-security clause, but also in instances where the facts show that the union action was necessary to the effective performance of its function of representing its constituency.
>
> Thus the Supreme Court has sanctioned union control over access to employment through hiring hall agreements,f4 even though recognizing that "the very existence of a hiring hall encourages union membership."
> And this Board has found legitimate a union's action in causing the layoff of an employee who insisted on working without receiving a subsistence allowance called for by the collective-bargaining agreements In such cases, the union's actions, while incidentally encouraging union membership, were nevertheless essential to its effective representation of employees." *id*. at 681. (footnotes omitted).

At the hearing in that case, the Union was not allowed to show that Murphy disrupted the hiring hall, as well as the Union election. The Board considered if such evidence might rebut the presumption of illegality under Section 8(b)(2) by demonstrating the "Union's action were necessary to the effective performance of its function in representing employees" in regard to operating the hiring hall." *id.* at 681-682. The Board concluded otherwise in view of the severity of the sanctions imposed for violation of the internal rules regarding conduct leading to its charges against Murphy. It stated:

> "Internal union discipline –fines, suspension, expulsion from membership, and the like ought surely to be adequate for this purpose. Thus, while the evidence proffered here might indeed show that the Union had no intent to encourage union membership by interfering with Murphy's employment, yet the display of union power exhibited by an exercise of control over employment opportunity *solely* for reasons relating to the conduct of an employee as a union member would necessarily have that effect*. Since the Union's discrimination against Murphy was, at best, related to his obligations as a union member such action by the Union comes within the proscription action of Section 8(b)(2)*. Upon this rationale, rather than the one adopted by the Administrative Law Judge, we find that Respondent violated Section 8(b)(1)(A) and 8(b)(2) of the Act, as alleged by the complaint." *Id.* at 681-682. (italics added)

Ultimately the 6th Circuit at 555 F.2d 552 (6th Cir. 1977) refused to enforce the Board's order finding a violation, on the basis of *Typographical Union No 2 (Triangle Publications)* 189 NLRB No. 105 (1971) where internal violations did rebut the presumption of illegality upon the Board's rationale that despite an inference of illegality under Section 8(b) (2), it does not:

> "outlaw discrimination in employment as such; only such discriminations as encourages or discourages membership in a labor organization is proscribed. From the foregoing it is apparent that the distinction between lawful and unlawful discrimination must be based upon whether the conduct encourages or discourages union membership, and that a finding to this effect, whether by inference or specific proof, is requisite to an 8(a)(3) or 8(b)(2) violation…. the conduct attributed to Respondent, *since motivated solely by Kelley's embezzlement*, did not constitute unlawful discrimination proscribed by the Act. *A discharge so grounded, if the basis for an employer's decision to terminate, would not run afoul of the Act." id.* at 830. (footnotes omitted). (italics added)

While Section 8(b)(2) inferences of illegality are not applicable in this case, nevertheless, it can be inferred and found based on the stipulations that the attendance rule assessment is not unlawfully motivated to either encourage or discourage union membership, or to restrain and coerce employees in the exercise of their Section 7 rights. The attendance rule is motivated to get people to work trade shows, which are large one-time events that need to be assembled quickly. Not showing up for work would be grounds for termination by an Employer. The assessments also reimburse the Union for the work and cost of finding a replacement for the no show who took the call.

Ohio Contractors Ass'n, rejects a *per se* application of the Act in these instances. It establishes the necessity defense. It distinguishes between Union internal rules that effect only members from permissible hiring hall assessments that interfere with

employment such as service fees. It is substantial authority in support of Respondent's position that this matter should be dismissed.

***3. Radio Officers' Union, Scofield and Allis Chalmers* cases.**

The General Counsel's Position Statement quotes *IWLU Local 13* at 1385, as follows: "Section 8(b)(1)(A), along with other parts of the Act, prevents unions from affecting members' employment status to enforce unions' internal rules. The policy of the Act is to insulate employees' jobs from their organizational rights. '*Radio Officers' Union of the Commercial Telegraphers Union, AFL v. NLRB*, 347 U.S. 17, 40 (1954).'" (Exhibit 9, p.2).

Placing the quote from *Radio Officers' Union* in further context the Board said:

> "Integral to the policy underlying both Section 8(b)(1)(A) and (2) of the Act was the intent to separate membership obligations owed by employees to their labor organizations from employment rights of those employees. 'The policy of the Act is to insulate employees' jobs from their organizational rights.' *The Radio Officers' Union of the Commercial Telegraphers Union, AFL v. NLRB*, 347 U.S. 17, 40 (1954).' More specifically, Section 8b(1), (2), and (3) of the Act 'form a web, of which Section 8b(1)(A) is only a strand preventing the union from inducing employer to use the emoluments of the job to enforce union rules.' *Scofield et al. v. N.L.R.B.*, 394 U.S. 423, 429 (1969). Similarly, '§§8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad or indifferent members, or abstain from joining any union without imperiling their livelihood.' *Radio Officers Union, supra.* Consequently, while a labor organization is free under the proviso to Section 8b(1)(A), 'to prescribe its own rules with respect to the acquisition of membership therein' its ability to enforce such rules is restricted by 'barring enforcement of a union's internal regulations to effect a member's status.' *Allis-Chalmers Manufacturing Co.* et al., 388 U.S. 175, 195 (1967) ….." *ILWU 13 ibid.* (underlining added)

Yet the General Counsel is trying to bar enforcement of union rules that do not affect membership status. *Radio Officers Union, Scofield and Allis-Chalmers* are now reviewed. They all involve rules only effecting membership status and employment.

Radio Officers Union was taken up to resolve conflicting interpretations of the Act between circuits courts on the issue of whether specific evidence intent to violate 8(a)(3) or 8(b)(2) by conduct encouraging or discouraging Union membership was required to be shown or if the Board could infer intent.

Three cases were consolidated, to wit, *Radio Officers Union* 93 NLRB 1523, and *Radio Officers Union v. N.L.R.B. 196, F2d 960, (2nd Cir 1952) cert granted 344 U.S. 853; International Brotherhood of Teamsters* 94 NLRB 1494 (1951), 196 F2d 1, cert granted 344 U.S 853 (8th Cir.); and *Gaynor News Corp 93 NLRB No. 36, 197 F. 2d 719, cert granted 345 U.S 902 (2nd Cir). These* cases were referred to respectively as *Radio Officers, Teamsters* and *Gaynor.*

The Supreme Court held it was "eminently reasonable for the Board to infer encouragement of union membership" in regard to the *Radio Officers and Teamster case." id.* at *52.*

In *Teamsters,* union security provisions were not in effect. The seniority list to refer employees to jobs contained both members and non members. The charging party was dropped to the bottom of the list *for not paying his union dues*. The Board found this violated 8(b)(1)(A) of the Act because it restrained and coerced him in the exercise of his Section 7 rights.

In *Radio Officers*, the union was enforcing its internal rule applying only to members. The charging party was not hired by Employer as the Union represented he was not a member in good standing of the Union, as required by the collective bargaining agreement, and for this reason the Union did not clear him to work. But in fact he was in good standing and the Board concluded the Union restrained and

coerced him in his statutory right to refrain from observing Union rules, and caused the Employer to discriminate against him to enforce his obedience as a member. This was upheld by the Second Circuit and the Supreme Court. Once an 8(b)(2) violation was inferred, it was a relatively straight forward application of the law to find a violation in order to insulate an employee's right to work from internal union affairs.

Finally, *Gaynor* involved charges by a non-union employee, alleging 8(a) (1), (2) and (3) violations against the employer for granting retroactive pay increases to employees who were union members, and refusing them to others because they were non-members. At the time of the raises, the employer had entered into an invalid union security clause. The Board upheld the Trial Examiner holding the discrimination encouraged union membership. The Second Circuit, according the Supreme Court, properly found the action was "'inherently conducive to increased union membership' in holding that a natural consequence of discrimination, based solely on union membership or lack thereof, is encouragement or discouragement of membership is such union, the court merely recognized a fact of common experience –that the desire of employees to unionize is directly proportional to the advantages thought to be obtained from such action." *id* at 46. No specific evidence of intent was required to find a violation of 8(a)(3) of the Act.

By contrast to *Radio Officers, Teamsters* and *Gaynor*, *supra*, in this case the nondiscriminatory actions of Respondent in maintaining the hiring halls rules cannot be inferred or even presumed to increase union membership.

In *Scofield v NLRB* 394 U.S. 423, 430 (1969), the union internal fines were for an employee demanding the employer pay in full for piece work in excess of union

established production ceilings were levied. The Supreme Court held this *did not violate* the Act and began its analysis, stating:

> "In the case at hand, there is no showing in the record that the fines were unreasonable or the mere fiat of a union leader, or that the membership of petitioners in the union was involuntary. Moreover, the enforcement of the rule was not carried out through means unacceptable in themselves, such as violence or employer discrimination."
>
> It was enforced solely through the internal technique of union fines, collected by threat of expulsion or judicial action. The inquiry must therefore focus on the legitimacy of the union interest vindicated by the rule and the extent to which any policy of the Act may be violated by the union-imposed production ceiling. *Scofield v. N. L. R. B.* 394 U.S. at 430-431.

The Court reviewed and contrasted the legislative history of 8(b)(1)(A) and 8(b)(2). It stated, at footnote 4, that "Section 8(b)(1)(A)'s legislative history requires a narrow construction which nevertheless proscribes unacceptable methods of union coercion such as physical violence to induce employees to join the union or to join in a strike." citing *National Maritime Union* 78 NLRB 971(1948)*, enforced,* 175 F.2d 686 (2d. Cir. 1949)." *Scofield* at 428. The Court recognized:

> "It is doubtless true that the union rule in question here affects the interests of all three participants in the labor-management relation: employer, employee, and union.[10]
>
> Although the enforcement of the rule is handled as an internal union matter, the rule has and was intended to have an impact beyond the confines of the union organization. But as *Allis-Chalmers* and *Marine Workers* made clear, it does not follow from this that the enforcement of the rule violates 8(b)(1)(A), unless some impairment of a statutory labor policy can be shown."[3] (footnotes omitted) *id.* 432

It was argued the rule impeded collective bargaining but the court rejected that contention as no impairment to the national labor policy was shown.

[3] *Marine Workers* is *Industrial Union of Marine & Shipbuilding Workers of America,* 159 N.L.R.B. 1065 (1966) (Union rule frustrating complaints to the Board not legitimate and contrary to policy of the Act.)

In *Allis Chalmers, supra,* the Supreme Court found the union did not violate Section 8(b)(1)(A) by threatening to impose a fine and bringing a collection suit against members who crossed a picket line to work during a strike. The Court extensively reviewed the legislative history of the Act and stated:

> "What legislative materials there are dealing with §8(b)(1)(A) contain not a single word referring to the application of its prohibitions to traditional internal union discipline in general, or disciplinary fines in particular. On the contrary there are a number of assurances by its sponsors that the section was not meant to regulate the internal affairs of unions." *id*. at 185-186.

While the attendance rule at issue is not a purely internal organizational rule, as in *Allis Chalmers,* the reach of §8(b)(1)(A) to union rules must be narrowly constructed to apply to unreasonable union coercion in supporting or not supporting a labor organization. The attendance rule cannot be said on its face to be unreasonable in that regard. Simply because it is not permitted under Section 7 as periodic due or initiation fee does not mean it is proscribed as it does not affect membership status, which is the one exception allowed under the Act to effect membership status to interfere with work.

Moreover, the General Counsel dismissed the Amended Charges that the Respondent unlawfully operated the hiring hall in a way that was arbitrary, discriminatory or in bad faith; or fined suspended and failed to refer an employee. Exhibit 3.

4. Fisher Theatre.

The General Counsel relied on *Fisher Theatre,* 240 NLRB 678, 691 (1979*)*. There the union unlawfully refused to refer members for failure to pay union fines which were calculated, in part, based on the cost of intra-union trials. The collective bargaining

agreement permitted members and non-union members to be referred to work at a 2/1 ratio.[4]

The ALJ, as to the charges of employees Misko and Craig, found that the Union failed to refer them to work for not paying a fine assessed for violating the union constitution and bylaws for conduct unbecoming a member by bumping a non-member off a job. *id.* at 682. After being found guilty, the Local President advised them in order to remain a member in good standing, the fine had to be paid within thirty days and if not the Union would not refer them out as members of the Union. *id. 691*

The ALJ in *Fisher* stated:

> "a refusal to refer for nonpayment of a fine is unlawful, at least ordinarily, regardless of why the fines imposed. However, the local contends that the reasons for the fines imposed on Misko and Craig constitute a legal defense to its refusal to refer them for nonpayment. I assume without deciding, that in unusual circumstances the reasons for a fine may constitute a defense to a refusal to refer for nonpayment or a basis for dismissing, for equitable reasons, a complaint based on such a refusal. [citation omitted]. However, I do not think that such unusual circumstances are presented here." *id.* at 691.

The ALJ addressed the union's assertion its refusal to refer the employees was justified by the necessity defense under *Ohio Contractors Ass'n* 204 NLRB 681 (1973), stating:

> "However, the Board has repeatedly held that a union violated the Act by refusing or threatening to refuse to refer an employee for nonpayment of a fine, without addressing the principles articulated in *Ohio Contractors* would have privileged the union to cause the employee to lose employment because of the conduct which led to the fine." *id.* at 691-692. (footnote and citations omitted).
>
> This approach is not based upon a mere semantic quibble. In the first place, because the local *could not fine non-members* (who constitute a majority of those on the referral list), the impact of any local no-bumping policy enforced by fines would likely differ between members and non-members and, therefore, might itself be unlawful. (*Radio Officers' Union [A.H. Bull Steamship Co. v N.L.R.B.*,

[4] This is clearly illegal in Utah where Respondent operates. Stipulation of Fact 8(a). Membership is not a condition of employment under the JRP. Stipulation of Fact 8(b).

> 347 U.S. 17, 24-28, 39-42, 52 (1954). Furthermore, the question which the internal disciplinary proceedings presented to the local membership was not whether Craig's and Misko's conduct should cause them to be debarred from referral until they paid their fines, but was whether such conduct should cause them to be fined." *Id.* at 692. (italics added).

Clearly, the ALJ is discussing union fines applying only to union members and this was crucial to his holding.

However, unlike in *Fisher*, in this case the attendance rule applies to members and non- members; it states there shall be no referral until the fines are paid; and it was precisely the rule that was knowingly enforced by the Union. The means of enforcement is set out plainly in the attendance rule itself.

In fact, the ALJ in *Fisher* did consider the necessity defense, concluding that the policy of enforcing a rule against bumping was not necessary by indefinite debarment and was arbitrarily enforced. *id.* at 692.

If *Fisher Theatre* stands for a *per se* rule against union fines interfering with employment, it is limited to fines based on membership status. It reaches this result in a tenuous manner but is distinguishable nevertheless.

In summary, the case law relied on the by the General Counsel does not support its position that the attendance rule is facially unlawful. To the contrary, the cases carefully evaluate the facts and issues in the context of the Act, the underlying labor policies and legislative history. They are all distinguishable and primarily involve Section 8(b)(2) of the Act and wholly internal rules affecting members only. The cases disapprove of *per se* rules and allow unions to rebut any presumption of illegality established under 8(b)(2). They reflect that Section 8(b)(1)(A) is only one strand in a web of provisions of the law on which the General Counsel relies. However, that strand

is limited and must be narrowly applied to prohibit union organizational conduct far more egregious than the attendance rule at issue which is properly motivated and enforced.

VI.

THE DERIVATIVE VIOLATION RULE HAS NO APPLICATION IN THIS MATTER

The scope of Section 8(b)(1)(A) is relatively narrow such that violations of other parts of the Act, like Section 8b(2), do not give rise to a derivative violation of 8(b)(1)(A). *National Maritime Union (Texas Co).,* 78 NLRB 971, 985, enf., 175 F.2d 686 ((2nd Cir, 1949).

The Supreme Court approved of this principle in *NLRB v Teamsters, Local 639 (Curtis Brothers)* 362 U.S. 274 (1960), holding Section 8(b)(1)(A) provides a limited prohibition relating to "union tactics involving violence, intimidation, and reprisals or threats thereof." *id.* at 290.

In *National Maritime Union* the Board reviewed in detail the legislative history or wrongful tactics as heard by the Senate Committee on Labor and Public Welfare, as well as the history of the bill. It stated:

> "Nor is there any suggestion in the legislative history of Section 8(b)(1)(A) that 'coercion" and 'restraint' may be found to flow automatically from a union's violation of Section 8(b)(2) where, as in this case the efforts of the union were not directed against a particular individual or group of individuals, and constituted merely an attempt to cause the employer to discriminate within the meaning of 8(b)(2)." *id*. at 985-986.

Thus a violation of Section 8(b)(1)(A) cannot derive from the policies regulated by 8(b)(2) of the Act. While Section 8(b)(1)(A) does allow a Union to enforce a union security clause, it does not prohibit an assessment for not showing up to work, but rather for "union tactics involving violence, intimidation, and reprisals or threats thereof."

Curtis, supra at 290. This is in accord with the discussion *supra*, at p. 20 of *Scofield,* at footnote 4 and *Maritime Union*. No such accusations of wrongdoing have been made against Respondent.

The General Counsel's contentions rely extensively on a web of the Act's unfair labor practice sections, principally of Section 8(a)(3) and 8(b)(2). But there are no allegations section 8(b)(2) has been violated. While the Amended Charge did allege an 8(b)(2) violation, the Regional Director approved its withdrawal by the charging party, leaving only the Section 8(b)(1)(A) charge "alleging the Charged Party maintains a written policy that hiring hall referents will not be dispatched until they pay their fines…." See Exhibit 3 to the Joint Stipulation of Facts.

The Employer was not charged and does not need to be to proceed against the Respondent on 8(b)(2) allegations. In this regard the Supreme Court stated in *Radio Officers' Union:*

> "Petitioner in *Radio Officers* contends that it was fatal error for the Board to proceed against it, a union, without joining the employer, and that, absent a finding of violation of 8(a)(3) by and a reinstatement order against such employer, the Board could not order the union to pay back pay under 8(b)(2).
>
> We find no support for these arguments in the Act. No such limitation is contained in the language of 8(b)(2). That section makes it clear that there are circumstances under which charges against a union for violating the section must be brought without joining a charge against the employer under 8(a)(3) for attempts to cause employers to discriminate are proscribed. Thus, a literal reading of the section requires only a showing that the union caused or attempted to cause the employer to engage in conduct which, if committed, would violate 8(a)(3).[58] No charge was filed against the company by Fowler when he filed his charge against the union." 347 U.S at 53. (footnote omitted)

Therefore, the General Counsel's case must stand or fall upon 8(b)(1)(A) and the policies underlying it.

VII.

THE UNION'S ATTENDANCE RULE IS JUSTIFIABLE, ALLOWED UNDER LAW AND CANNOT BE ILLEGAL ON ITS FACE.

The Union is legally entitled to justify its attendance rule and therefore it cannot be illegal on its face, as shown *Ohio Contractors Ass'n.*

Additionally, precedent exists for a balancing the employees Section 7 rights with the Union's legitimate interests in establishing and enforcing the rule.

In *Steelworkers Local 9292 (Allied Signal Technical Services Corp)* 336 NLRB 52, (2001) the Board reviewed whether union discipline against the charging party for filing union internal charges that the Union president had improperly withdrawn a grievance violated the Act. It held it did not as the Union "had a legitimate and substantial interest is policing its internal operations." *id.* at 52. The Board stated

> "Assuming, as we do, that there is a connection to the employment relationship under *Sandia, [Office Employees Local 251 (Sandia National Laboratories)*, 331 NLRB 1417 (2000)] then the Union's discipline of Johnson comes within the scope of Section 8(b)(1)(A). We must then determine whether the discipline violated Section 8(b)(1)(A), by balancing Johnson's Section 7 rights against the legitimacy of the union interests at stake, in accord with longstanding precedent." *supra* at 54

In the Board's analysis recognized that the charging party was exercising his Section 7 right to question the adequacy and legitimacy of the Union's representation and to change its direction, and the union discipline arguable restrained his section 7 rights and adversely affected his employment conditions and right to pursue grievances.

> "We next examine the Union's interests at stake in this case. We find that, to the extent that Johnson's suspension from union membership may be deemed a restraint on Section 7 rights, that restraint is more than counter-balanced by the Union's legitimate interest in maintaining control over the grievance process and

> in policing its internal affairs so as to avoid erosion of its status. By filing internal union charges protesting Hutsell's handling of grievances, Johnson was attempting to dictate the Union's contractual grievance policy. As the Board and courts have long recognized, a union has a legitimate interest in maintaining control over the grievance process. Unions for the most part lack the resources necessary to fully investigate and prosecute to arbitration every grievance filed. Accordingly, they must be free to decide, in good faith, which grievances to pursue and which to abandon or to trade off in favor of some other advantage."

The Board found the filing of repeated internal charges by the charging parties, was time consuming, recognizing the limited resources of union to investigate and pursue grievances. It recognized the Union's right under 8(b)(1)(A) prohibitions and the 8(b)(1)(A) proviso that specified that that section's protection against restraint on Section 7 rights "shall not impair the right of a labor organization to proscribe its own rules with respect to the acquisition or retention of membership therein."

Thus union rules impacting employment can outweigh an employee's Section 7 rights. Charging Party's Section 7 rights are not impacted by the attendance rule, he is not assisting the union by paying the assessment, or if he is on balance his rights are outweighed by the costs the Union incurs by servicing and replacing him.

The Board has sanctioned union hiring hall rules which affect conditions of employment. A Union can refuse to refer an employee who has not adhered to the hiring hall rules. See *Painters Local 487 (American Coatings*, 226 NLRB 299 (1975) where the union showed under the necessity defense its non referral was legitimate to make sure the referral list was not being abused. No violation of 8b(1)(A) or (2) found.

It is well settled law that non-members can be charged non-discriminatory service fees for their share of the hiring hall cost, even though the fee is not required of dues paying members. *Pittsburgh Press C*. v. NLRB 304 N.L.R.B. 866, 977 F 2d 652, 661. (D.C. Cir 1992), citing *Teamsters Local 357 v. NLRB*, 365 U.S. 667, 674 (1961).

A Union is not in violation of 8(b)(1)(A) of the Act for causing an Employer to refuse to hire a referent who refuses to pay a hiring hall service fee. *Plasterers & Cement Masons, Local 534 (Duron Maguire E. Corp)*, 216 NLRB 568, vacated sub nom. *Frattaroli v. N.L.R.B.*, 526 F.2d 1189, (1st Cir. 1975), on remand, 235 N.L.R.B.826 (1978), rev'd 590 F.2d 15 (1st Cir 1978).

There the Board initially dismissed the complaint in the absence of allegations the Union charged excessive/discriminatory fees as a condition of employment, stating:

> "The complaint alleges that the Respondent Union restrained and coerced nonmembers Frattaroli and Ventresca in the exercise of the rights guaranteed by Section 7 of the Act "by demanding an exaction of money which was not an initiation fee or dues as a requirement for the continuous employment" by the Employer and thereby violated Section 8(b)(1)(A) of the Act. The complaint further alleges that the Respondent Union caused or attempted to cause the Employer to refuse to hire Frattarroli and Ventresea "because of their failure and/or refusal to pay an exaction of money which was not an initiation fee or dues" to the Respondent Union and thereby violated Section 8(b)(2) of the Act.
>
> The allegations of the complaint fail to state facts showing a violation of the Act has occurred. The complaint speaks only in terms of "an exaction of money which was not an initiation fee or dues." It is well-established that a reasonable hiring hall fee may be imposed upon applicants for referral as long as such fees are imposed in a nondiscriminatory manner. These fees have been referred to by a variety of terms including service fees, referral fees, and permit fees. There is no allegation that the Union sought to require nonmembers Frattaroli and Ventresca to pay assessments in excess of costs attributable to the hiring hall and related collective bargaining. As we find, *infra,* that Respondent Union had, by contract, a valid, exclusive referral system applicable to the job Fratarroli and Ventresca had been hired for, it was entirely proper for it to require that they comply with the nondiscriminatory conditions pursuant to which job referrals were made. Accordingly, in the absence of any allegation that the Union charged ***excessive*** or discriminatory fees as a condition of referral to employment or for continued employment, we find that no violation has been alleged." 216 NLRB at 568.

On remand from the court, the Board upheld its decision, stating the Respondent Union did not have the burden to show it operated an exclusive

nondiscriminatory referral system; noting the ALJ was in accord; and finding lacking a prima facie case or allegations to that effect, the burden was the General Counsel's.

Ultimately, however, the First Circuit reversed on grounds it was not supported by substantial evidence as the ALJ found the fee was impermissible in the absence of an exclusive hiring hall. The Court concluded:

> "Since the union was operating a referral system for members only and not an exclusive hiring hall, the fee sought from Ventresca and Frattaroli was not legitimate, and the union violated §§ 8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act. We remand the case to the Board for the limited purpose of considering what relief is appropriate. The matter should be dismissed. Nevertheless, the ALJ wrongly imposed that burden on the Union, lacking allegations relating to the manner of operating the referral system. Frattaroli v. N.L.R.B., 590 F.2d 15, 19 (1st Cir. 1978).

In this case the evidence is sufficient to dismiss the case as the General Counsel has only alleged the mere maintenance of such a rule in a violation of the Act. Clearly such a rule is allowable under law and as recognized in *Frattarolli, supra.*

In *IATSE Local 834 (Shepard Convention Services)* 10 CB 9005, the Union maintained a Job Referral Procedure to conventions, exhibitions and trade shows. Exhibit 8 at page 1. The JRP establishes a charge for not showing up to work, beginning with $25.00 for the first offense, and ultimately progressing to $150.00 and then suspensions from the referral list for progressing period. Somewhat similar fines are imposed for being late. *id*. at Article 5 A and B, page 4.

However, if the fine is not paid within 30 days, the JRP provides the Union will immediately suspend the employee from the referral list. *id.* at 5N p. 5. Referent Womak filed an unfair labor practice charge against the Union, according to the Regional Director's Decision to Dismiss, contending and finding:

> "that the Union had threatened you with suspension and levied fines against you for failing to follow referral hall's no-show/call in requirements because of your criticism of the Union's business agent,… The investigation revealed that the Union applied Section 5.A of its referral rules governing 'no-shows' for work, for your failure to follow the rules on January 26 and 31, 2010. You admittedly did not call the Union's agent on January 26, 2010 when you failed to appear for the work assignment. In addition Section 5.N. of the referral rules provides for a suspension from the referral list for failure to pay a levied fine. The documentary evidence submitted by the Union established that fines for all 'no-shows' are uniformly applied to all members who fail to follow the established rules. Under these circumstances, the evidence was insufficient to establish that the Union had an improper or illegal motive in assessing the fines." Joint Statement of Facts Exhibit 7 at page 1.

Region 10 had before it a charge regarding enforcement of a similar hiring hall referral provision that suspended referents, apparently members of the union, from the list for non-payment of fines for violating hiring hall procedures. The Union justified its operation of the hiring hall and the Region found no problems in the union enforcing the rule and dismissed the charge.

Based on the above precedent, it is seen a Union's hiring hall procedures, including the assessment of charges other than periodic dues and initiation fees, are not prohibited and are justifiable and permitted under law.

VIII.

THE COMPLAINT FAILS TO STATE A CLAIM AND SHOULD BE DISMISSED.

The Complaint does not allege the assessment is unwarranted, unreasonable, excessive, or even discriminatory. The attendance rule is not so unreasonable on its face that it cannot be justified under Section 8(b)(1)(A). As argued, it is clear the intent of this section applies to egregious, primarily organizational conduct, which is not the conduct at issue in this case.

As in *Plasterers & Cement Masons, Local 534, and Frattarolli, supra,* the Complaint should be dismissed, as the attendance rule is not facially invalid but rather is lawful as it applies to both members and non members using the hall, and the Respondent should not be put to the burden of demonstrating it is further justified, lacking allegations it is otherwise improper in view of the withdrawn charges.

Indeed by stipulation the General Counsel concedes the rules and fines are necessary for the effective performance of the hiring hall. See Stipulation at 8(g). The suspension for non-payment of the assessment is inextricable intertwined in the attendance rule stipulated to be part of it.

The General Counsel has never taken into consideration the Union's interests or operational needs in representing employees and operating the hiring hall.

Nor has it tried to balance the charging party's questionable Section 7 interests in not paying the assessment for not showing up to work against the Union's interests in establishing an effective and prompt means of getting him to show up for work and preventing him from adversely affecting others missing the call he took.

How coercive is the attendance rule? The Union has a substantial interest, in using its limited resources getting people to replace those who have accepted referrals. The fines are also corrective and progressive discipline. They cannot readily be enforced without a suspension because offenders could continue with impunity to violate the no show rules, and take calls without consequence. By the time the trade show is over, the damage is done to the Union, the Employer and the public.

Going to court to collect the small assessments is a bigger waste of Union resources and arguably coercive as well.

The attendance rule exacts an assessment fee owing as a condition of employment that is no different than a hiring hall service fee which is not prohibited by the Act under the national labor policy. It does not improperly restraint or coerce employees Section 7 rights and is a legitimate measure to operate the hiring hall.

The General Counsel has failed to identify, evaluate or articulate what policies under the Act are at stake in this matter.

The Complaint and contentions against Respondent's attendance rule are overly simplistic and ill considered. They rely on rote case citations of derivative case law, out of context, without a genuine effort to understand what these cases are about or what Congress intended. They are based on a fallacy, the assumption that because the Act permits unions to enforce union security clauses against its members, it cannot preclude an employee from work if they have not paid another assessment, in this case for not working a call they accepted. The exception to collect union dues and interfere with work, only restricts the Union from affecting membership status by other assessments and interfering with employment under the Act. Membership status has nothing to do with the charging party not being referred to work. It was for him not showing up to work - the primary reason, and for not paying the fine for that reason.

If the Union merely suspended the referent for not showing up for work, and charged nothing, in all likelihood this case would not have been pursued. Yet that is a harsher result then the fine itself.

In view of this record, the Complaint should be dismissed for failure to state a claim. Respondent should not be put to further expense and burden to justify its operation of the hiring hall when it has not been brought into question. The only genuine

issue before the Board has been if the attendance rule was facially unlawful or otherwise lawful. The Board should find the attendance rule is lawful and the matter should be dismissed.

IX.

IF THE BOARD DOES NOT DISMISS THE COMPLAINT IT SHOULD BE REMANDED FOR HEARING.

The Union submits that not showing up for work is an egregious offense in the trade show industry that causes harm to referents, the Union, the employers and even the public. The Union has limited resources to deal with no shows. The Union's legitimate interests maintaining a hiring hall may be inferred from the record, but if not, a hearing should be scheduled to show the Union rule is justified or to resolve the matter in view of the Board determinations.

The parties waived hearing in this matter to get to the specific issue before the Board. A hearing would not resolve that question in an expedited manner, and would unnecessarily burdening the Respondent with proof, or proffers thereof, on rebuttal issues which may turn out to not be relevant or material if the attendance rule is facially invalid and therefore cannot be justified, as contended by the General Counsel, or is otherwise lawful on its face, as Respondent contends it is.

If neither is the case, and the complaint is not dismissed, the Board in the interests of justice should remand this matter to an ALJ for hearing on rebuttal issues and as directed.

Respectfully submitted to the Board May 21, 2014.

s/_____
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CERTIFICATE OF SERVICE

I certify that I served a copy on the following on May 21, 2014 by electronic transmission to:

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